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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 390

SCOTT M. LOFTIN AND JOHN W. MARTIN, AS TRUSTEES OF FLORIDA EAST COAST RAILWAY COMPANY,
Petitioners,

vs.

CHRISTINE DEAL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

To the Honorable, the Supreme Court of the United States:

The Petition for Certiorari should be denied, because:

First: There is no federal question involved, and

Second: The attempt to inject a federal question in the case was made too late.

We shall present these two propositions in the reverse order of that stated above.

I.

The Attempt to Inject a Federal Question in the Case Was Made Too Late.

The first attempt to inject a federal question in this case was made in Petitioners application for rehearing in

the Supreme Court of Florida. (See pages 152-154 of Transcript of Record.) Up to this point there had been no suggestion of a federal question. If the question presented is a federal question (we do not agree that it is) it is because of the verdict of the jury and the judgment of the lower court—not because of the opinion of the Florida Supreme Court—hence the question should have been presented both in the trial court and in the Florida Supreme Court so that these courts could have passed on it. In fact, we submit that this was essential to jurisdiction here. The application for rehearing was denied without any observation (See page 155 of Transcript).

This Court has held on many occasions that a federal question was too late when first presented on application for re-hearing which was denied by the State Court without passing on the point. *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 64 L. Ed. 213, 40 S. C. R. 116; *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, 64 L. Ed. 255, 40 S. C. R. 133; *Jelt Bros. Distilling Company* v. *Carrollton*, 252 U. S. 1, 64 L. Ed. 421, 40 S. C. R. 255, and other cases.

In *Corkran Oil, etc. Co.* v. *Arnaudet*, 199 U. S. 182, 50 L. Ed. 143, 26 S. C. R. 41, Mr. Chief Justice Fuller said, in passing on an identical situation, "but this came too late, unless the petition was entertained and the point passed on."

In *American Surety Company* v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. C. R. 98, 86 A. L. R. 298 (text pages 303, 304) the late Mr. Justice Brandeis said, in speaking of the federal question being raised for the first time in an application for re-hearing "In that Petition * * * *it urged for the first time that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The Petition was denied without opinion.* The federal claim there made cannot serve as the basis for review by this court. The conten-

tion that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection, had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment." (Italics ours.)

In the case here, the question, while basically going to the verdict and judgment of the trial court, was never raised until the Application for re-hearing. Therefore, if it presents a federal question, it comes too late, but

II.

There Is No Federal Question Involved.

Respondent urges that the record before this Court is wholly devoid of a Federal question, hence, there is no jurisdiction to entertain the petition for Writ of Certiorari.

The record discloses that the husband of respondent was killed in a railroad crossing accident in an incorporated city. The usual pleadings were filed, alleging negligence of the railroad company, the death of the deceased and the consequent damages to the plaintiff below. Pleas of not guilty and contributory negligence were filed by the defendant below, petitioner here. The trial resulted in a verdict of $10,000.00 for the plaintiff below from which an appeal was taken to the Supreme Court of Florida and there affirmed. A petition for re-hearing was filed by defendant below, and denied without observation.

The Comparative Negligence Statute of Florida (Section 768.06, Florida Statutes of 1941) and the Presumptive Negligence Statutes of Florida (Section 768.05, Florida Statutes of 1941) have been held not to offend against the Federal or State constitutional guarantees of equal pro-

tection of the law in the recent case of *Loftin* v. *Crowley, Inc.*, 8 So. (2nd) 909; 150 Fla. 836; 142 A. L. R. 626, and inferentially by this court in denying certiorari from that judgment, in the case of *Loftin, et al.*, v. *Crowley, Inc.*, 63 S. C. R. 60, 317 U. S. 661.

For the Court's convenience we here set forth the above statutes:

> "768.05 Liability of Railroad Company. A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.
>
> 768.06 Comparative Negligence. No person shall recover damages from a railroad company for injury to himself, or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."

Petitioners predicate their Petition upon inferences drawn from quoted portions of the opinion of the Florida Supreme Court (See pages 4 & 5, Petition for Writ and supporting brief). From that part of the opinion quoted this court would be led to believe that the Petitioners were free from negligence. In order that the court may not be misled we, too, quote from the same section of the opinion, but have supplied the portions deleted from petitioners quotation and are adding one paragraph which immediately follows. That portion of the opinion here quoted,

which appears in italics, is that portion which was omitted by petitioners:

"Deal was quite familiar with the intersection, as he had passed there continually for many years *while delivering his produce to the platform maintained by the railroad company for the use of its patrons. The physical characteristics of the locality are quite important in determining the merits of the appeal, so before we proceed further we will undertake to describe them using approximate dimensions and distances.*

"Beginning thirty feet from the south line of Lake Street, which the deceased was traveling when struck, and extending southerly for 225 feet and ten feet distant from the nearest rail of the northbound track was a platform four feet in height. It was triangular in shape, six feet in width at the point nearest the crossing, and thirty feet wide two hundred feet further south. Along the east side of the platform was a spur track, and immediately east of that a paved street which entered Lake Street at right angles. The platform was roofed, but was open except for two small enclosures used as offices. On the east side of the main track and north of Lake Street was a warning signal designed to flash alternate red lights upon the approach of a train, and west of the crossing and south of the street was a device of the same kind.

"Deal was seen on the platform shortly before the collision, and evidently he proceeded from there northerly, thence westerly to the crossing. Whether in his course he drove so close to the platform as not to be able to observe the lights facing that entrance to the intersection cannot be definitely determined from the testimony.

"Three circumstances seem not in dispute: the nature of the platform, the relative positions of adjacent tracks and streets, and the speed of the train, which was sixty-five miles per hour. Because of the size of the platform and its proximity to the main line, the street, and the crossing we think the conclusion may be logically drawn that there was such an obstruction of the view to the

south as to make the intersection extremely dangerous. It is clear that it was necessary for a vehicle to be almost upon the track—one witness testified that a car had to be within four feet of it— before the driver could see an oncoming northbound train. Of course, the consequences of getting in the path of a thousand tons, the weight of the train in question, of metal hurtling along at ninety-two feet a second are frightening. There was a preponderance of evidence, *however*, that the whistle was blown repeatedly as the train neared the scene and that the bell on the locomotive was ringing. When the engineer saw the truck perilously near the track he applied the emergency brakes and brought the train to a stop as quickly as he could without derailing it. *Only contradiction of the statements that the whistle and the bell were sounded was the testimony of one witness who said simply that he did not hear, which may have been attributable to the blustery day.* There was abundant proof, too, that the signal lights were flashing. *Uncontroverted was the evidence that they were so constructed as to become energized when a train came within three thousand feet of the crossing and that each device contained two lights with two filaments, so that both filaments in both lights would have to fail before the signal ceased to function, a remote possibility. More important, there was no contradiction of the testimony of an inspector who stated positively that a few days before the accident and the day afterward the apparatuses were tested and found working properly. There was no dispute whatever about the good condition of the surface of the crossing.* No one denied the story of a traveler who approached from the opposite direction *immediately before the mishap and who had an unobstructed view of the oncoming train, the truck, and the collision.* He testified that the red signal light facing him on the west side of the track was functioning. He saw and heeded it and made a frantic effort to warn the deceased of the impending danger.

"*In these circumstances we must determine whether the speed of the train at the place we have described*

and under the conditions we have related was negligence and whether the deceased made a contribution in negligence to his own death.

"The company had found it necessary to construct the platform and buildings the better to serve the public, and yet in that very effort an obstruction was created and congestion occasioned. There was sure to lurk some danger of collision between passing trains and vehicles hauling produce to the station. Obviously the company had diligently tried to minimize that danger by the maintenance of an adequate signal system. The engineer attempted further to lessen the danger in this particular instance by sounding the whistle and ringing the bell, yet Deal went on the track, not heeding these sounds if he heard and not paying attention to the warning of the other traveler if he saw.

"The whole picture leads us to believe that negligence was chargeable to both parties to the cause: to appellants on account of the speed of the train at that particular point; to appellee because deceased entered the danger zone, with which he was entirely familiar, heedless of the warnings being given by the train, the signal device, and the other traveler. The jury probably so found, invoking the rule of comparative negligence, Section 768.06, Florida Statutes, 1941, and F. S. A. as they were charged by the court to do if they found the circumstances justified that course. The amount of the verdict indicates that this was their purpose.

The question presented by Petitioners (page 4 of Petition and Supporting brief) was based on that part of the opinion quoted above in plain type—In view of what the court actually held as revealed by the italicized portion of the opinion, the question presented is misleading and should fall by its own weight. In its most favorabe light, it is wholly devoid of any Federal question.

Title 28, Section 344, U. S. C. A., and Section 237 Judicial Code as amended prescribed the jurisdiction of this

court with reference to the review of judgments of the Supreme Court of the several states by certiorari. Petitioners base their petition for Writ of Certiorari upon that portion of the above cited act reading:

> "* * * or where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution or any treaty or statute of, or commission held, or authority exercised under, the United States * * * "

The record here is wholly devoid of any such "*title, right, privilege or immunity*" being "*specially set up or claimed*" by the Petitioners. (Italics supplied.)

Rule 38 of this Court indicates the character of reasons which will be considered in an application for certiorari to review judgments of a state court and we quote:

> "(a) Where a state court has decided a Federal question of substance, not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court."

We fail to find in the printed record before this court any Federal question of substance. Certainly no Federal question of substance was ever decided by either the trial court or the Supreme Court of Florida, for the simple reason that no such question was ever raised or involved. There is no intimation in the record of such question until the filing in the Supreme Court of Florida of Petitioners application for re-hearing which was denied without observation.

> "The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay"—quoting from *New Orleans* v. *Waterworks Co.*, 142 U. S. 79,

12 S. C. R. 142, in the case of *Hamblin* v. *Western Land Company,* 147 U. S. 31, 13 S. C. R. 353, 37 L. Ed. 267.

"The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plentitude of their powers. It permits no evasion by the state court of the responsibility of determining the Federal question if necessary to be determined; it permits no assumption by this court of jurisdiction to review the decision of local questions. The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the Federal question necessarily we have to consider, but, as we said in Johnson vs. Risk (Tennessee 1890) 137 U. S. 300, 11 Supreme Court 111, 34 Law Ed. 683, 'Where a defense is distinctly made, resting on local statutes, we should not, in order to raise a Federal question, resort to critical conjecture as to the action of the court, in the disposition of such defenses' and, of course, the principle is applicable whether the question is presented as a ground of defense or a ground of action." *Adams* v. *Russell* (Michigan 1913), 229 M. S. 353; 33 S. C. R. 846; 57 L. Ed. 1294.

"Where neither the pleadings in the trial court, nor the assignment of errors, nor the opinion of the Supreme Court, contained any reference to the Federal question, there is color for a motion to dismiss." *East Tennessee V. & G. Ry. Co.* v. *Frazier* (Tenn. 1891), 11 Supreme Court 517, 519; 139 U. S. 288, 35 L. Ed. 196. (Headnote.)

III.

Conclusion.

The fundamental proposition presented may be stated as follows:

"Will the Supreme Court of the United States entertain a Petition for Writ of Certiorari where the sole question

presented is the sufficiency of the evidence in the trial court to sustain the verdict?''

If our position is sound, the Petition for Writ of Certiorari, is wholly without merit. In such event it is respectfully submitted that the respondent—revealed by the record to be a negro woman with ten minor children—has been damaged by the delay. She should be awarded damages as contemplated by Section 878, Title 28 U. S. C. A.; Sec. 344(c) Title 28 U. S. C. A. and Rule 30 of this court.

Respectfully submitted,

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